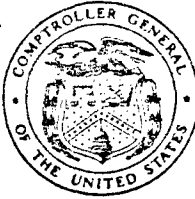


DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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PLM-1
Westfall

FILE: B-199360

DATE: May 5, 1981

MATTER OF: Dian Estrada - Entitlement to overtime
pay for travel to training

- DIGEST:**
1. Army civilian intern who traveled to training on nonworkday at time and via route selected by agency is entitled to credit for hours worked under the Fair Labor Standards Act for travel time during hours corresponding to regular work hours. Where intern, for personal reasons, traveled at time or via route other than time or route selected by agency, she will be credited with lesser of (1) that portion of actual travel time which is considered to be working time, or (2) that portion of estimated travel time which would have been considered working time had she traveled at time and by route selected by Army.
 2. An interpretation of 5 U.S.C. 5542 (b)(2)(B)(IV) that travel to a training course which is scheduled by employee's agency does not qualify as compensable travel under that section has no relation to whether such travel time is hours worked under the Fair Labor Standards Act (FLSA).
 3. If an agency allows an employee to schedule travel and the employee travels during corresponding hours on a nonworkday, the agency may not subsequently defeat the employee's entitlement to overtime compensation by stating that the travel should not have been scheduled in the manner

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the employee chose. If, however, the employee travels by a route or at a time other than that directed by the agency, or if she travels by POV as a matter of personal preference, then a constructive travel time of the agency preferred schedule or mode of travel must be used to determine the amount of hours worked under FLSA.

This decision addresses the issue of overtime entitlement for travel on nonworkdays to and from training assignments. It involves a consideration of overtime entitlement under both title 5, U.S. Code, and under the Fair Labor Standards Act (FLSA), title 29, U.S. Code.

Mr. Leon Avelar, Jr., a Finance and Accounting Officer with the Department of the Army, requests an advance decision regarding the claim of Ms. Dian Estrada, an intern with the Department of the Army Materiel and Readiness Command (DARCOM), for overtime pay for travel to and from training on nonworkdays. Ms. Estrada claims a total of 24 hours 45 minutes of overtime for five separate trips from her duty station in Corpus Christi, Texas, to various Government scheduled training programs elsewhere. The hours of overtime claimed by Ms. Estrada, the routing and time of actual travel, and the Army's constructed routing and time for her training trips are as follows:

- (a) Trip to Rock Island, IL. on Sunday, November 26, 1978
- Hours claimed: 7.00 (Constructed Travel Time)
 - Actual travel: Depart San Antonio 1450
Arrive Moline, IL. 2030
 - Army's constructed routing:
Depart Corpus Christi, TX. 1445
Arrive Moline, IL. 1941

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B-199360

- (b) Trip to Dallas on Sunday, February 25, 1979
 - Hours claimed: 2.00 (Constructed Travel Time)
 - Actual travel: Depart Corpus Christi, TX. 0900
Arrive Dallas, TX. 1450
 - Army's constructed routing:
Depart Corpus Christi, TX. 1435
Arrive Dallas, TX. 1620
- (c) Trip to Rock Island, IL. on Sunday, March 18, 1979
 - Hours claimed: 7.00 (Constructed Travel Time)
 - Actual travel: Depart Corpus Christi, TX. 1000
Arrive Moline, IL. 1925
- (d) Trip to Fort Benjamin Harrison, IN. on Sunday,
June 3, 1979
 - Hours claimed: 6.75
 - Actual travel: Depart Corpus Christi, TX. 0645
Arrive Fort Benjamin
Harrison, IN. 1330
- (e) Trip to Fort Worth, TX. on Sunday, September 9, 1979
 - Hours claimed: 2.00 (Constructed Travel Time)
 - Actual travel: Depart Corpus Christi, TX. 0800
Arrive Fort Worth, TX. 1830
 - Army's constructed routing:
Depart Corpus Christi, TX. 1553
Arrive Dallas - Fort Worth 1615

Ms. Estrada was authorized to travel by air on the first four trips and by personally owned vehicle on the fifth. The record indicates that the common carrier terminal designated by the Commander of the Corpus Christi Army Depot for use by official duty travelers was Corpus Christi International Airport. The record also reflects that Ms. Estrada's regular work hours were 0700-1530, Monday through Friday, with a break for lunch between 1130 and 1200.

Mr. Avelar asks whether DARCOM interns are entitled to overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., as amended by Public

B-199360

Law 93-259, approved April 8, 1974, for time spent traveling to training courses where the scheduling is administratively controlled. In this regard the record shows that DARCOM interns are covered (non-exempt) under FLSA. Mr. Avelar points to the Federal Personnel Manual (FPM) Supplement 990-2, Book 550, Subchapter S1-3, page 550-8.03 (added July 1969) as authority for the proposition that overtime should not be paid for such travel. The latter reference addresses the issue of employee entitlement to overtime compensation for time spent traveling to Government controlled training courses outside normal work hours as follows:

"* * * training courses throughout the country generally are scheduled to start at the beginning of the workweek, and usually start at 9 a.m. daily. Attendance at training centers located away from an employee's duty station, therefore, usually will require the employee to travel outside his normal work hours. Since the agency which is conducting the training course can schedule the hours of training, the training course is an event which can be scheduled or controlled administratively; and employees who attend the course will not be paid for time in travel status regardless of whether employed by the agency conducting the training course or another agency."

This FPM provision relates to overtime compensation entitlement under title 5, U.S. Code, however, and not to overtime compensation under FLSA. We have held that where FLSA provides an employee with a greater pay benefit than that to which he is entitled under 5 U.S.C. § 5542, the employee is entitled to the FLSA benefit. 54 Comp. Gen. 371, 375 (1974). Thus, it is clear that Ms. Estrada would not be entitled to overtime pay under 5 U.S.C. § 5542(b)(2) (B)(iv). See e.g. B-193127, May 31, 1979. However, a separate determination must still be made as to whether or not she is entitled under FLSA.

We begin by noting that the Civil Service Commission (now Office of Personnel Management) has determined that 5 U.S.C. § 4109(a) "prohibits the payment of overtime pay to an employee selected and assigned for training, for the period of training, regardless of whether the employee's eligibility for overtime pay is based on provisions found in title 5 of the United States Code, or based on the Fair Labor Standards Act, as amended by Public Law 93-259." FPM Letter No. 551-3, August 29, 1974. The Commission, however, has also determined that this prohibition "does not prevent payment of overtime pay to employees traveling to and from places of training." FPM Supplement 990-2, Book 550, Subchapter S1-3, page 550-8.05. Accordingly, 5 U.S.C. § 4109(a) does not bar the payment of overtime compensation to Ms. Estrada for periods of travel to and from training assignments.

Time spent traveling outside regular working hours is "hours of work" under FLSA if a nonexempt employee:

"(1) performs work while traveling (including travel as a driver of a vehicle), (2) travels as a passenger to a temporary duty station and returns during the same day, or (3) travels as a passenger on nonworkdays during hours which correspond to his/her regular working hours." FPM Letter No. 551-10, April 30, 1976.

In Eugene L. Mellinger, B-183493, July 28, 1976, the Comptroller General followed the Civil Service Commission's definition of "hours of work" in determining that "[i]f the employee is traveling as a passenger on a non-workday * * *, he may only be compensated for the traveltime that is within the corresponding hours of work on his workday." Time spent traveling on a nonworkday during hours which do not correspond to regular working hours is considered hours of work only if the employee actually works while traveling. Meal periods are not included in hours worked.

The Army, however, contends that since Ms. Estrada could have scheduled her travel outside of her corresponding work hours in several cases, much of the travel performed here should not be compensated.

When an employee travels by a mode of transportation or at a time other than that selected by the employing agency, special rules prescribed by the Office of Personnel Management apply. When an employee, for personal reasons, does not use the mode of transportation designated by the agency, the employee is credited with the lesser of "(1) that portion of the actual travel time which is to be considered working time under these instructions [FPM Letter 551-10], or (2) that portion of the estimated travel time which would have been considered working time under these instructions had the employee used the mode of transportation selected by the employing agency." Similarly, when an employee, for personal reasons, travels at a time or via a route other than the time or route selected by the employing agency, the employee is credited with the lesser of "(1) that portion of the actual travel time which is to be considered working time under these instructions [FPM Letter 551-10] or (2) that portion of the estimated travel time which would have been considered working time under these instructions had the employee traveled at the time and by the route selected by the employing agency." FPM Letter 551-10, p. 4.

The Office of Personnel Management (OPM) has supplied us with the following interpretation of the above rules as applied to Ms. Estrada's case:

"* * * DARCOM appears to be maintaining that an employee should schedule his or her travel in such a manner as to assure that it is not compensable under the FLSA. It should be noted that 5 U.S.C. § 6101(b)(2) urges agencies to schedule travel

away from the official duty station during an employee's regularly scheduled workweek (i.e., in order to make it compensable). While this is not a binding requirement, it does establish the principle that Federal employees should not be asked to travel on their own time unless there is no alternative. In any case, nothing in title 5 or the FLSA requires an employee to schedule his or her travel so as to render it non-compensable. It is true that an agency can schedule travel outside regular hours or "corresponding hours," but if the agency allows the employee to schedule the travel during corresponding hours, it is responsible for any overtime entitlement that may be 'suffered or permitted' under the FLSA."

We agree with OPM that if an agency allows an employee to schedule travel and the employee travels during corresponding hours on a nonworkday, the agency may not subsequently defeat the employee's entitlement to overtime compensation by stating that the travel should not have been scheduled in the manner the employee chose. If, however, it is because of the employee's personal preference that she travels by a route or at a time other than that which the agency directs, or by POV, then a constructive travel time of the agency preferred route, or time or mode of travel must be used to determine hours of compensable work. FPM Letter 551-10, p. 4.

When the above rules are applied to Ms. Estrada's five trips, therefore, the following entitlements under FLSA result:

(1) On Sunday November 26, 1978, Ms. Estrada traveled for only 40 minutes of her corresponding work hours, 1450-1530 and therefore only 40 minutes of the

travel may be credited as hours worked. The routing from San Antonio was apparently for Ms. Estrada's personal reasons as she should have left from Corpus Christi. However, the constructive travel from Corpus Christi to Moline would have had Ms. Estrada traveling for 45 minutes during her corresponding work hours and since the lesser of the actual or constructive travel time is the 40 minutes of actual travel time, Ms. Estrada is only entitled to 40 minutes. FPM Letter 551-10, p. 4.

(2) For Ms. Estrada's trip to Dallas on February 25, 1979, she is entitled to 55 minutes credited as work time. She traveled by an indirect route (i.e., via San Antonio) for her personal convenience. Accordingly, she is credited with the time which would have been considered hours worked had she traveled at the time and by the route selected by the agency. Ms. Estrada should have departed Corpus Christi at 1435, and her regular working hours ended at 1530, giving a constructive work time of 55 minutes.

(3) For the trip to Rock Island, Illinois, on March 18, 1979, Ms. Estrada is entitled to credit for 5 hours worked as follows: travel time between 1000, when she departed, and 1530, the end of her regular working hours, less 30 minutes for lunch.

(4) For the trip to Fort Benjamin Harrison, Indiana, on June 3, 1979, Ms. Estrada is entitled to credit for 6 hours worked as follows: she is credited with time between 0700, the beginning of her regular workday, at which point she had already been traveling 15 minutes, and 1330, the hour at which she arrived at Fort Benjamin Harrison, less 30 minutes for lunch.

(5) For the trip to Fort Worth, Texas, on September 9, 1979, Ms. Estrada is not entitled to any credit for hours worked. Although Ms. Estrada traveled in an automobile during 7 of her corresponding hours of work (the record does not show

B-199360

whether she was the driver), she was authorized the use of POV because of her personal preference. On her travel orders the following mileage reimbursement was authorized her:

"Mileage reimbursement and per diem limited to constructive cost of common carrier transportation and related per diem as determined in JTR. Travel time limited as indicated in JTR."

Paragraph C4660 of JTR Vol. 11 reads as follows:

"When temporary duty travel is performed by privately owned conveyance, travel time will be allowed as follows:

1. actual time necessary to perform the travel when the use of a privately owned conveyance is determined to be advantageous to the Government;
2. constructive scheduled travel time of the common carrier used in computing per diem when temporary duty travel by privately owned conveyance is not determined to be advantageous to the Government, except for travel under par. C2158."

Accordingly, the Army had in effect allowed Ms. Estrada to travel by POV in lieu of requiring her to use common carrier because of her personal preference. Under these circumstances, Ms. Estrada's travel time must be computed as "* * *" that portion of the estimated travel time which would have been considered working time under these instructions had the employee used the mode of transportation selected

B-199360

by the employing agency." FPM Letter 551-10, p. 4. Since Ms. Estrada would have been scheduled to travel by common carrier after her corresponding work hours, there is no FLSA entitlement for the last trip.

Ms. Estrada is entitled to have 12 hours and 35 minutes credited as hours worked under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., (1976). Any of these hours worked which caused her total hours worked to exceed 40 in a week are compensable as overtime under FLSA. However, it must be borne in mind that leave and holidays are not counted as hours of work under FLSA. FPM Letter 551-1, Attachment 5. B., May 15, 1974.

A handwritten signature in dark ink, reading "Milton J. Forster". The signature is written in a cursive style with a large, stylized "M" and "F".

Acting Comptroller General
of the United States